Filed 10/27/09 In re Chester C. CA4/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re CHESTER C. III, a Person Coming Under the Juvenile Court Law.	
ORANGE COUNTY SOCIAL SERVICES AGENCY, Plaintiff and Respondent, v. CHESTER C. JR., Defendant and Appellant.	G041521 (Super. Ct. No. J-432114) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Robert Austin, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Merrill Lee Toole, under appointment by the Court of Appeal, for Defendant and Appellant.

Nicholas S. Chrisos, County Counsel, Karen L. Christensen and Julie J. Agin, Deputy County Counsel, for Plaintiff and Respondent.

* * *

Chester C., Jr. appeals from the termination of parental rights to his son, Chester C. III (Chester). The father contends reversal is required because the adoptability finding is not supported by substantial evidence, the beneficial relationship exception to adoption should have been applied, and the notice given under the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.) was inadequate. We affirm.

FACTS

Chester has been in the dependency system since August 1995, when he and his two older sisters were detained. Chester, then three and one-half years old, was placed in Orangewood Children's Home. During the time that SSA looked for placement, he exhibited behavior problems and was referred for counseling. In December 1995, Chester and his sisters were placed in a foster home. After some initial destructive behavior, Chester adjusted well to the foster home.

The parents were offered reunification services and weekly monitored visitation. In May and June 1996, the father hit and pinched Chester and his sister during two visits, so the court ordered the father's visits to take place only with the children's consent and in the presence of their therapist. The father did not visit the children again until December 1996 because they were afraid of him. The girls continued to express fear but went to the visit with Chester, who wanted to see his father. "During this visit, the father was appropriate with the minors and brought a gift for each of them."

Chester's behavior had begun to deteriorate after the father's abuse in the summer of 1996; in August, SSA reported "[h]e hoards food, steals from stores, and can be aggressive and destructive. He was the most affected by the father's abuse . . . during visits." In January, the foster parents asked that he be removed from their home due to his increasingly destructive behavior. "[Chester] set a small fire in the . . . bathroom

several days before Christmas. [He] has broken electronic equipment [and] stole[n] from stores throughout placement. . . . Most recently, [he] pushed a one-year-old down the stairs at the foster home."

Chester was returned to Orangewood, where he remained for five months. While there, he was evaluated and diagnosed with "Oppositional Defiant Disorder, Attention Deficit Hyperactivity Disorder and mixed Specific Developmental Disorder." He was referred to a group home for intensive treatment. The father attended weekly monitored visits with Chester at Orangewood; the child "often regressed during visits," but the father's behavior was "appropriate."

The court terminated reunification services to the parents in April 1997 and held a permanent plan selection hearing in July. Chester had been placed in Canyon Acres, a group home, in June 1997. The court found that Chester was not adoptable and placed him in long term foster care. He refused to visit with the father for a few months after he was moved to the group home; then monitored visits resumed. The visits were sporadic, however, because the father often failed to show up.

Chester's level of functioning improved gradually. He attended a small private special education school, and by the time he was in the fifth grade, his school behavior reports were "consistently positive" and his grades had gone from failing to "satisfactory or above in most subjects." In the summer of 2001, he was moved to a less structured six-bed group home, where he continued to receive weekly individual and group therapy. His therapist reported in November 2001: "At times [Chester] can be charming, friendly, positively interact with his peers and follow staff direction when it is first given. At other times he is defiant, manipulative and continually testing limits. . . . Staff has used prompts, limit setting, rewarding positive behavior and time outs to help Chester control his behavior. He has been placed in several prone holds since he moved . . . ."

The father was "fairly consistent" in visiting Chester on Sundays. The visits were unmonitored, and the father would take Chester off grounds for up to six hours. "Chester says he enjoys spending time with his father and looks forward to his visits. He is very disappointed when his father does not show up."

In November 2001, the father filed a petition under Welfare and Institutions Code section 388 seeking custody of Chester or additional reunification services and increased visitation. In February 2002, the court granted the petition and ordered six months of reunification services. In August, the court ordered an additional six months of services. The father visited Chester regularly and Chester benefitted from the visits, but SSA could not place Chester with the father because he did not have stable housing or employment. In January 2003, the court ordered six more months of reunification services, based on SSA's assessment that "reunification appears to be a probability." But in June 2003, the court again terminated the father's reunification services and placed Chester in long-term foster care, finding that he was not adoptable.

A year later, the father's visits had become sporadic and he failed to contact the group home when he was not going to come. "[Chester] will wait for his father's arrival, refusing to leave the home until the scheduled time for the visit has expired. If the father does not show, Chester remains angry and disappointed for the remainder of that day and at times is moody for several days afterwards. When the father does attend visits, he is often significantly late." By late 2004, the father's whereabouts were unknown and he had not contacted Chester in several months.

In October 2005, SSA reported that the father "no longer visits . . . ." However, "Chester has made substantial progress in school and he has transitioned in to mainstream high school. This is extraordinary progress for Chester, who typically avoids any uncertain situation." Potential foster parents had been located "and they were introduced to Chester as mentors in order to facilitate a relationship without triggering excessive social anxiety." But Chester's grades plummeted during his freshman year.

The group home program manager "suggested that Chester was sabotaging his own efforts at school as a way of dealing with anxiety surrounding his move into a foster home . . . ."

The plan was to place him in the foster home, which was a certified Intensive Treatment Foster Care home, after his freshman year in high school. The transition took place sooner, in February 2006. "Given Chester's social phobias and anxieties, it was anticipated that Chester might have significant problems adjusting to the home. On the contrary, Chester's transition has been rather smooth." He was extremely anxious about moving to a new school, but "[h]is foster parents toured the school with him and accompanied him on his first day of classes. Since then, he has been able to go to school without incident."

In April 2006, the father appeared at the review hearing. The court authorized weekly telephone calls, but the father called only twice during the next year and made no attempt to visit. He appeared in court again in March 2007; the court authorized bus passes so he could visit Chester in Riverside County, but he did not.

In September 2007, SSA recommended that the court set another permanent plan selection hearing. The foster family wanted to adopt Chester, and he told the social worker he wanted to be adopted by them "so that he would have stability and permanency." He continued to make progress, exhibiting less anxiety and participating actively in the life of his foster family; his grades were improving. The court adopted SSA's recommendation and set a hearing pursuant to Welfare and Institutions Code section 366.26 for January 2008.[1]

In January 2008, SSA reported that Chester wanted to be adopted, stating his foster father is a "'good dad'" and his foster mother "helps him with his homework." He gets along well with the other three children in the home. During the Thanksgiving

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[1] All statutory references are to the Welfare and Institutions Code unless otherwise specified.

break, Chester's father and sister had visited him at his foster home. He wanted to maintain contact with the father, which the social worker and the foster parents supported. The hearing was continued to February 2008, but by then, Chester no longer wanted to be adopted but wanted a plan of legal guardianship. The foster parents were not interested in legal guardianship, so SSA recommended the plan remain long-term foster care. The court adopted SSA's recommendation and set a review hearing for August 2008.

In August, SSA reported that Chester had changed his mind and now wanted to be adopted. "He stated that he changed his mind because he realizes that his own father lives in an overcrowded living situation and could not possibly take care of him. He also stated that he knows he can see his father again as an adult whenever he wants." Chester's therapist met with the family weekly for two hours. "During the sessions, [Chester] and the other three children who are pending adoption talk about adoption, house rules and normal developmental issues. [The therapist] stated that [Chester] has expressed his feelings about the [T.'s] adopting him and that he has been consistently saying that he wants to be adopted for the last six weeks." The court set another permanent plan selection hearing for January 2009.

SSA's report of January 15, 2009 was admitted at the hearing. Chester was in the 12th grade and doing well. He had not seen his father in over a year, "and he expresses indifference when speaking of him." The foster parents had adopted the three other children in their care, and Chester was looking forward to officially joining the family.

SSA reported a "quality of care issue" that had been reported against the foster family in February 2007. "The reports indicated that the applicants were using inappropriate parenting methods that included having the children in their care write dictionary definitions for hours at a time. Further, there was a report that the female applicant grabbed one child by the neck." Community Care Licensing gave the foster

family a corrective action plan, which consisted of additional parenting training through their foster family agency. They completed the training "and no further concerns were present."

SSA also reported the foster father's driver's license had been suspended three times in the last four years, and the foster mother's license had been suspended once. The social worker had not yet discussed this with the foster parents but would do so "in a follow-up for the updated adoptive homestudy." Nevertheless, the social worker was enthusiastic about Chester's impending adoption, citing his progress over the almost three years he had been with the family and the positive influence they have had on him.

Both Chester and the father testified at the hearing. Chester said he had last seen his father on his birthday, in October 2008. The summer before that, he and his father went to Fallbrook to meet other members of his biological family. Chester stated, "Every time I see him it's great because we get to hang around, do fun stuff." He wanted to see his father "[e]very chance he has to come out" because "I wouldn't want to lose him in my life or forget about him." He understood the differences between adoption, legal guardianship, and long-term foster care, and he understood that he could continue to live with his foster family no matter which permanent plan was ordered for him. He also understood that terminating his father's parental rights meant that the father would no longer be his legal father. Nevertheless, Chester wanted to be adopted by his foster parents. His previous hesitation was because he thought adoption meant he could no longer see his father. But once he turned 18, he could "see him if I wanted to."

The juvenile court found it was "clear" that adoption was in Chester's best interests and that it was likely he would be adopted. It found there had been no consistent or regular visitation by the parents and that terminating parental rights would not be detrimental to Chester. It terminated parental rights and ordered adoption to be the permanent plan.

DISCUSSION

Adoptability Finding

The father contends the termination of his parental rights was erroneous because there is not substantial evidence to support the finding that Chester was adoptable. The father correctly points out that Chester is 17 years old with special needs and is adoptable only because the T.'s want to adopt him and he wants to be adopted by them. The father argues because the suspension of the T.'s drivers' licenses has not been fully investigated, SSA could discover that the foster parents are not qualified to adopt, thus derailing the plan of adoption or delaying it beyond Chester's 18th birthday. We disagree.

In order to terminate parental rights, the juvenile court must find, by clear and convincing evidence, "that it is likely the child will be adopted" within a reasonable time. (§ 366.26, subd. (c)(1); *In re Erik P.* (2002) 104 Cal.App.4th 395, 399.) This inquiry usually looks at "the minor's age, physical condition, and emotional state" to determine whether prospective adoptive parents would be willing to adopt. (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649.) "However, where the child is deemed adoptable based solely on the fact that a particular family is willing to adopt him or her, the trial court must determine whether there is a legal impediment to adoption. [Citation.]" (*In re Carl R.* (2005) 128 Cal.App.4th 1051, 1061.)

The only legal requirements for the adoption of a child for whom parental rights have been terminated are that the prospective adoptive parents must be at least 10 years older than the child (Fam. Code, § 8601, subd. (a)); a married prospective adoptive parent must obtain the consent of his or her spouse (Fam. Code, § 8603); and the child must consent to the adoption if he or she is more than 12 years old (Fam. Code, § 8602). (See *Sharon S. v. Superior Court* (2003) 31 Cal.4th 417, 428-429.) These basic requirements were all met by the T.'s. Furthermore, there is no impediment to Chester's adoption after his 18th birthday. "An adult may adopt another adult who is

younger . . . by an adoption agreement approved by the court, as provided in this chapter." (Fam. Code, § 9320, subd. (a).) If Chester is adopted by the T.'s as an adult, he and they will be in "the legal relationship of parent and child and have all the rights and [be] subject to all the duties of that relationship." (Fam. Code, § 9305.)

The father's objections to the T.'s go to their general suitability to adopt. "General suitability to adopt is a subjective matter which does not constitute a legal impediment to adoption." (*In re Scott M.* (1993) 13 Cal.App.4th 839, 844; see also *In re T.S.* (2003) 113 Cal.App.4th 1323, 1329.) Whether the scenarios behind the suspended drivers' licenses reveal character flaws or criminal activity will not result in the T.'s automatic disqualification as adoptive parents. They will merely be part of the factors considered by the court when determining whether the T.'s are suitable to adopt Chester. (See Fam. Code, § 8712, subd. (b).) "[Q]uestions about the 'suitability' of a prospective adoptive family are 'irrelevant to the issue whether [a minor is] likely to be adopted.' [Citation.] Such questions are 'reserved for the subsequent adoption proceeding,' not the section 366.26 hearing whether to terminate parental rights. [Citation.]" (*In re T.S.*, *supra*, 113 Cal.App.4th at p. 1329.)

Beneficial Relationship Exception

The father contends the court erred in failing to find his relationship with Chester outweighed the benefits of adoption. He argues Chester is clearly bonded to him and wants him to continue to be a part of his life. There was no error.

At a permanent plan selection hearing, the juvenile court will ordinarily terminate parental rights if it finds by clear and convincing evidence that a child is adoptable. The termination of parental rights to an adoptable child can be avoided, however, if the court finds "a compelling reason for determining that termination would be detrimental to the child" due to at least one of several statutorily-described circumstances. (§ 366.26, subds. (c)(1)(B)(i)-(iv).) The so-called beneficial relationship exception describes circumstances where "[t]he parents have maintained regular

visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).) In order to prove that the exception applies, a father must overcome the strong statutory presumption in favor of adoption and show that the relationship between him and the child is so beneficial that its severance would render the termination of parental rights detrimental to the child. (*In re Helen W.* (2007) 150 Cal.App.4th 71, 80-81.)

The father made no showing that the termination of his parental rights would be detrimental to Chester. The father is unable to provide Chester with the permanency and stability he derives from his foster family, and he and Chester will be able to continue their relationship to the extent they choose to do so.

ICWA Notice

At the detention hearing, the father claimed Cherokee descent through his mother, and the mother believed her father was or is an enrolled member of the Havasupai tribe in Arizona. After being interviewed, the mother told SSA she had possible Cherokee heritage through her grandmother and possible Choctaw heritage through her grandfather. SSA sent notices to the Bureau of Indian Affairs (BIA), Choctaw Nation, the Havasupai Tribal Council, United Keetoowah Band of Cherokee Indians, Cherokee Center for Family Services, and Eastern Band of Cherokee Indians.

In September 2007, the social worker reviewed the ICWA history of Chester's case and realized no response had been received from the Choctaw Nation and the Havasupai Tribal Council. He asked the ICWA unit "to follow up on these leads." The ICWA social worker reviewed the case file and interviewed the father, who corrected his mother's maiden name. New notices were sent to the BIA, Choctaw Nation of Oklahoma, Jena Band-Choctaw, Mississippi Band of Choctaw Indians, Cherokee Nation, Eastern Band of Cherokee Indians, United Keetoowah Band of Cherokee, and Havasupai Tribal Council. SSA's report stated, "The child's mother's whereabouts is unknown and

she could not be interviewed." Return notices were filed with the juvenile court. The juvenile court found that ICWA did not apply in August 2008.

The father claims the ICWA notice was inadequate because SSA did not re-interview the mother after September 2007. He points out SSA knew how to contact the mother and did so when it served her notice of the January 2009 hearing; thus, her whereabouts were not unknown and it could have interviewed her before it sent out the updated notices. Under the circumstances of this case, there was no error.

"ICWA was enacted 'to promote the stability and security of Indian tribes and families by establishing minimum standards for removal of Indian children from their families and placement of such children "in foster or adoptive homes which will reflect the unique values of Indian culture. . . ."' [Citations.]" (*In re Jeremiah G.* (2009) 172 Cal.App.4th 1514, 1520.) An Indian child is defined by ICWA as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe . . . ." (25 U.S.C. § 1903(4).)

If the juvenile court "knows or has reason to know that an Indian child is involved," the social worker must "make further inquiry regarding the possible Indian status of the child" and must send notice of the pending dependency proceedings to the identified tribe or to the Bureau of Indian Affairs. (25 U.S.C. § 1912(a); § 224.2, subd. (a), § 224.3, subds. (c) & (d).) The juvenile court may have reason to know that the dependency proceedings involve an Indian child if, inter alia, "[a] person having an interest in the child, including the child, an officer of the court, a tribe, an Indian organization, a public or private agency, or a member of the child's extended family provides information suggesting the child is a member of a tribe or eligible for membership in a tribe or one or more of the child's biological parents, grandparents, or great-grandparents are or were a member of a tribe." (§ 224.3, subd. (b)(1).)

It is true that the court and SSA have "an affirmative and continuing duty" to inquire about a dependent child's Indian heritage whenever there is reason to know that the child may be an Indian child. (§ 224.3, subd. (a).) But this duty is not unlimited. The mother was thoroughly interviewed in 1995. There is nothing in the record to indicate new facts had emerged to suggest the mother had new information to offer. Furthermore, in this case, a limited reversal and remand to comply with the dictates of ICWA would further the interests of no one.

DISPOSITION

The judgment is affirmed.

SILLS, P. J.

WE CONCUR:

ARONSON, J.

FYBEL, J.